ABDUL LATIFF HJ MOHAIDEEN v. MEASAT BROADCAST NETWORK SYSTEMS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
WAN MUHAMMAD AMIN JC
[CIVIL APPEAL NO: WA-12ANCC-147-11-2021]
19 DECEMBER 2022

Abstract – *A stay of proceedings pending reference of a dispute to arbitration ought not to be allowed when it prevents an aggrieved party from proceeding to trial to prove its claim on triable issues. As the issues that the arbitral proceedings will deal with and the issues that the court is to determine are different, arbitral proceedings can proceed concurrently with the court proceedings. Neither the 'rare and compelling circumstances' test or the traditional special circumstances test are satisfied herein to warrant the grant of a stay.*

CIVIL PROCEDURE: *Stay of proceedings – Appeal against – Appeal against stay of proceedings pending reference of dispute to arbitration – Whether claim premature – Whether there would be multiplicity of proceedings if arbitral proceedings proceeded at same time with court proceedings against director of company – Whether there would be risk of conflicting decisions – Whether rare and compelling circumstances test or special circumstances test satisfied – Whether stay ought to be granted*

This was an appeal against the decision of the Sessions Court allowing the application of the second defendant ('respondent') for, *inter alia,* a stay of proceedings pending reference of the dispute to arbitration pursuant to the inherent jurisdiction of the court ('this appeal.') The appellant filed a claim against the respondent and the first defendant (Lineclear Motion Pictures Sdn Bhd ('Lineclear') at the Sessions Court. The appellant and Lineclear entered into an agreement ('film agreement') to, *inter alia*, produce films. At the material time, the respondent was a director and majority shareholder of Lineclear. The respondent had executed a deed of guarantee ('guarantee'). The guarantee, *inter alia*, guaranteed the performance of Lineclear under the film agreement and indemnified the plaintiff against all losses, liabilities, damages, costs and expenses arising out of Lineclear's failure to perform, *inter alia*, its obligations under the film agreement. The appellant's claim against Lineclear and the respondent were: (i) against Lineclear – for breach of the film agreement where the appellant had not been presented with any films for its consideration to be produced with Lineclear, leading to a failure

on the part of Lineclear to perform its obligations under the film agreement. The appellant had paid RM937,500 to Lineclear and was claiming this sum including general damages and costs; and (ii) against the respondent – the appellant was seeking to recover RM937,500 from the respondent based on the guarantee. The failure of Lineclear to perform its obligations under the film agreement represented a breach of the terms of the guarantee on the part of the respondent, in his failure to ensure such performance by Lineclear. The film agreement contained an arbitration agreement and after the present case was filed at the Sessions Court, Lineclear applied to stay proceedings against Lineclear pending reference of the dispute to arbitration pursuant to s.10 of the Arbitration Act 2005 ('AA') in which Lineclear was restrained from raising the issue of limitation under s. 6 of the Limitation Act 1953 and the arbitral proceedings. Lineclear had since filed an appeal to the Court of Appeal against the stay order. Following the stay order, arbitral proceedings ('arbitral proceedings') were initiated but had not proceeded to date as Lineclear had not made the payment for the provisional advance deposit. Lineclear was subsequently wound up. The appellant's action against the respondent would have proceeded at the Sessions Court had it not been for the stay which was granted by the Sessions Court Judge ('SCJ') being the subject matter of this appeal. In the application and this appeal, the respondent sought to strike out, or alternatively, stay the proceedings against him on, essentially, the following grounds: (i) the appellant's claim against the respondent was premature; (ii) that there would be a multiplicity of proceedings if the arbitral proceedings proceeded at the same time with the court proceedings against the respondent; and (iii) that there was a risk of conflicting decisions in the arbitral proceedings and the court proceedings.

Held (allowing appeal; setting aside Sessions Court order):

(1) The appellant had a standalone right to seek recourse against the respondent and was not based on liability being first established against Lineclear. In this regard, the terms of the guarantee include an indemnity which entitled the appellant to take action against the respondent independent of its claim against Lineclear. It was for the court to determine if the respondent was liable to the appellant. The outcome of the arbitral proceedings was irrelevant because it would not bind the respondent. There was no reason why the appellant's claim against the respondent could not proceed simultaneously with the arbitral proceedings. The SCJ had proceeded to make a determination on the merits of the appellant's case by finding that the appellant's case against the respondent was dependent upon liability being first established against Lineclear. The SCJ erred in making this finding as she had prejudged the appellant's claim and her decision prevented the appellant from proceeding to trial to prove its claim against the respondent. Whether the guarantee included an indemnity, separate and

distinct and enforceable against the respondent with or without Lineclear, was a triable issue. The appellant's claim against the respondent was not premature. (paras 33-46)

(2) The appellant's case against the respondent (before the Sessions Court) was whether the respondent had breached the terms of the guarantee whereas in the arbitral proceedings the issue was whether there had been a breach of the film agreement by Lineclear and/or whether there was a total failure of consideration. The appellant's claim against the respondent could proceed independently of the appellant's claim against Lineclear in the arbitral proceedings. The arbitral decision involving Lineclear would not bind the court or the respondent who was not a party to the arbitral proceedings. Being a non-party to the arbitral proceedings, any award the arbitral tribunal makes would not bind the respondent. The fact that the claimed sum against Lineclear and the respondent was the same did not render the action against the respondent not capable of being determined by the court. The Sessions Court had misconstrued a cause of action with a remedy. The appellant was entitled to seek the same remedy from different causes of action. The appellant should be allowed to prove its case against the respondent at the trial of this matter. Thus, multiplicity of proceedings did not arise. (para 48)

(3) The issues that the arbitral proceedings would deal with and the issues that the Sessions Court was to determine were different. The arbitral proceedings can proceed concurrently with the court proceedings. The decision of the arbitral tribunal involving Lineclear would not bind the court or the respondent who was not a party to the arbitral proceedings and neither had the respondent, in applying for a stay, agreed to be bound by the decision of the arbitral proceedings in the case before the Sessions Court. In any event, there would be no conflicting decisions. (paras 49-52)

(4) Whether it was based on the 'rare and compelling circumstances' test or the traditional special circumstances test, weighing on all the relevant factors, neither test had been satisfied to warrant the grant of a stay as prayed for by the respondent. The SCJ had erred in granting the stay and this justified intervention in the decision. The Sessions Court's order also appeared to have granted a stay pending reference of the dispute (between the appellant and the respondent) to arbitration. The dispute between the appellant and the respondent could not be referred to arbitration as there was no arbitration agreement in the guarantee between the appellant and the respondent. Thus, such an order could not be granted under the circumstances, even if the respondent satisfied the 'rare and compelling' circumstances test or the special circumstances test. (paras 59 & 60)

A **Case(s) referred to:**
Apex Marble Sdn Bhd & Anor v. Leong Tat Yan [2021] 1 LNS 37 CA ***(refd)***
Douglas Ding Jangan & Ors v. Kerajaan Negeri Sarawak & Ors [2021] 7 CLJ 653 FC ***(refd)***
Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd [2013] 3 CLJ 47 CA ***(refd)***
LNH Landscaping Sdn Bhd v. TKH Construction Sdn Bhd & Other Appeals [2021] 1 LNS 581 HC ***(refd)***
B *Protasco Bhd v. Tey Por Yee & Another Appeal [2018] 5 CLJ 299 CA* ***(refd)***
Tomolugen Holdings Ltd A And Another v. Silica Investors Ltd And Others Appeals [2015] SGCA 57 ***(refd)***
Vertex Superieur Sdn Bhd & Anor v. Shell Malaysia Trading Sdn Bhd [2021] 1 LNS 1297 HC ***(refd)***

C **Legislation referred to:**
Arbitration Act 2005, s. 10(2)
Limitation Act 1953, s. 6

For the appellant - K Shanti Mogan & Denise Choo; M/s Shearn Delamore & Co
For the respondent - Faisal Moideen & Julian Ch'ng; M/s Moideen & Max

D *[Editor's note: Appeal from Sessions Court; Suit No: WA-A52NCC-1288-09-2020.]*

Reported by Suhainah Wahiduddin

JUDGMENT

E **Wan Muhammad Amin JC:**

[1] This was an appeal against the decision of the Sessions Court dated 8 November 2021 allowing the respondent/second defendant's application ("the application") for, *inter alia*, a stay of proceedings pending reference of
F the dispute to arbitration pursuant to the inherent jurisdiction of the court ("this appeal").

[2] It must be highlighted that the application was not made pursuant to s. 10 of the Arbitration Act 2005 ("Arbitration Act") and in the application the respondent had also sought to strike out the suit as an alternative to the
G stay which he applied for.

[3] The relief sought by the respondent in the application are essentially as follows:

> (a) bahawa writ dan pernyataan tuntutan terpinda plaintif kedua-duanya bertarikh 3.8.2021 ("tuntutan plaintif") terhadap Defendan
H ke-2 dibatalkan menurut Aturan 19 Kaedah 10(b), (c) dan/atau (d) Kaedah-Kaedah Mahkamah 2012;
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> (b) sebagai alternatif, semua prosiding dalam tindakan ini terhadap Defendan Ke-2 digantungkan sementara menunggu rujukan pertikaian ke timbang tara menurut bidang kuasa sedia ada
I Mahkamah Yang Mulia ini;

(c) bahawa Defendan Ke-2 diberi kebebasan untuk memfailkan Pembelaannya dalam tempoh masa empat belas (14) hari selepas pendengaran dan pelupusan permohonan ini sekiranya permohonan ini tidak dibenarkan;

[4] The learned Sessions Court Judge allowed prayers (b) and (c) above.

[5] At this juncture I must emphasise that the respondent did not file an appeal (or cross-appeal) against the decision of the Sessions Court which did not allow prayer (a) of the application, that is to strike out the suit (see *Douglas Ding Jangan & Ors v. Kerajaan Negeri Sarawak & Ors* [2021] 7 CLJ 653; [2021] 4 MLJ 946). For this reason, I did not take into consideration the arguments of learned counsel for the respondent regarding the Sessions Court's decision not to strike out the suit against the respondent and have confined the arguments only on the issue of the stay which the Sessions Court granted, being the subject matter of this appeal.

[6] I must also add that prayer (b) of the application was a relief that the respondent had specifically prayed for in the alternative and having been granted the said prayer cannot now complaint that the Sessions Court and now this court ought to strike out the suit against the respondent under prayer (a) of the application (paras. 16 and 76 of the respondent's written submissions (encl. 10).

Background

[7] The appellant filed a claim against the respondent (second defendants) and the first defendant (Lineclear Motion Pictures Sdn Bhd) ("Lineclear") at the Sessions Court.

[8] The appellant and Lineclear entered into an agreement called "Film Co-investment agreement" dated 28 March 2014 ("film agreement") to, *inter alia*, produce films.

[9] At the material time, the respondent was a director and majority shareholder of Lineclear. The respondent had executed a "deed of guarantee" dated 28 March 2014 ("guarantee"). The guarantee, *inter alia*, guarantees the performance of Lineclear under the film agreement and indemnifies the plaintiff against all losses, liabilities, damages, costs and expenses arising out of Lineclear's failure to perform, *inter alia*, its obligations under the film agreement.

[10] The appellant's claim against Lineclear and the respondent as pleaded in its amended statement of claim ("statement of claim") is summarised as follows:

(i) against Lineclear – for breach of the film agreement where the appellant has not been presented with any films for its consideration to be produced with Lineclear, leading to a failure on part of the Lineclear to

perform its obligations under the film agreement. The appellant has paid RM937,500 to Lineclear and is claiming this sum including general damages and costs;

(ii) against the respondent – the appellant is seeking to recover the RM937,500 from the respondent based on the guarantee. The failure of Lineclear to perform its obligations under the film agreement represents a breach of the terms of the guarantee on the part of the respondent, in his failure to ensure such performance by Lineclear.

[11] The film agreement contains an arbitration agreement and after the present case was filed at the Sessions Court, Lineclear applied to stay proceedings against Lineclear pending reference of the dispute to arbitration pursuant to s. 10 of the Arbitration Act and the stay was granted by the High Court on appeal ("stay order").

[12] However, Lineclear is not satisfied with the condition imposed by the High Court in the stay order pursuant to s. 10(2) of the Arbitration Act in which Lineclear is restrained from raising the issue of limitation under s. 6 of the Limitation Act 1953 at the arbitral proceedings. Lineclear has since filed an appeal to the Court of Appeal against the stay order.

[13] Following the stay order, arbitral proceedings ("arbitral proceedings") were initiated but have not proceeded to date as Lineclear has not made the payment for the provisional advance deposit.

[14] Further, Lineclear was wound up on 8 March 2022.

[15] The appellant's action against the respondent would have proceeded at the Sessions Court had it not been for the stay which was granted by the learned Sessions Court Judge being the subject matter of this appeal.

Grounds Relied On By The Respondent In The Application And In This Appeal

[16] In the application and this appeal the respondent sought to strike out or alternatively stay the proceedings against him on essentially the following grounds:

(i) the appellant's claim against the respondent is premature;

(ii) there would be a multiplicity of proceedings if the arbitral proceedings proceeds at the same time with the court proceedings against the respondent; and

(iii) that there is a risk of conflicting decisions in the arbitral proceedings and the court proceedings.

Sessions Court's Grounds For Granting The Stay Of Proceedings

[17] In her grounds of judgment the learned Sessions Court Judge granted the stay of proceedings for the following reasons:

(i) it was unsafe for the proceedings to proceed. This is stated in para. 2.4 of her grounds as follows:

> Mahkamah berpendapat bahawa adalah **tidak selamat** bagi untuk meneruskan tindakan ini terhadap defendan Kedua sehingga prosiding timbang tara antara Plaintif dan Defendan Pertama selesai dan diputuskan. (emphasis added)

(ii) the appellant's claim against Lineclear and the respondent involve the same debt owed by Lineclear and is the main issue. Therefore, it is appropriate for the proceedings to be stayed pending the disposal of the arbitral proceedings. This can be seen in para. 3.3 of the learned Sessions Court's Judge's grounds which states:

> Mahkamah mendapati bahawa tuntutan Plaintif terhadap Defendan Kedua adalah **sama dengan tuntutan Plaintif** terhadap Defendan Pertama iaitu jumlah **hutang yang tidak dibayar oleh Defendan Pertama** kepada Plaintif dan berpendapat bahawa ia merupakan isu utama dan maka dengan itu **adalah sesuai keseluruhan prosiding di Mahkamah ini ditangguhkan** dahulu sementara prosiding di Tribunal Timbang Tara selesai dan diputuskan. (emphasis added)

(iii) the Sessions Court has the discretion to grant the stay to avoid the following:

> ... **ketidakkemasan prosiding** seperti untuk memanggil saksi-saksi yang sama untuk memberi keterangan, penandaan eksibit yang mungkin akan lari sususan dan masa serta kos semua pihak. (emphasis added)

(iv) the learned Sessions Court Judge then concluded as follows:

> Adalah jelas bahawa Defendan Pertama adalah Penghutang Prinsipal dan Defendan Kedua merupakan Penghutang Sekunder iaitu penjamin kepada Defendan Pertama dan bertanggungjawab ke atas **kegagalan obligasi Defendan Pertama hanya apabila kegagalan obligasi Defendan telah disahkan**. (emphasis added)

[18] It would appear that the issue of the appellant's claim against the respondent being premature and the risk of conflicting decisions in the arbitral proceedings and the Sessions Court proceedings were not part of grounds that were relied on by the learned Sessions Court Judge.

A **The Law And Principles Applicable To An Application For Stay Of Proceedings Pending Reference To Arbitration**

[19] It must first be emphasised that unlike in the case of Lineclear, there is no arbitration clause/agreement in the guarantee.

B **[20]** This then gives rise to the issue of what test is to be applied for the granting of a stay against non-parties to an arbitration agreement.

[21] In *Apex Marble Sdn Bhd & Anor v. Leong Tat Yan* [2021] 1 LNS 37 where the Court of Appeal applied the "rare and compelling circumstances" test where it was held as follows:

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> [28] The threshold that has to be reached to warrant of a stay of proceedings against non-parties pending arbitration, was considered and rightly applied in the case of *Jacob and Toraif Consulting Sdn Bhd v. Siemens Industry Software GMbH & Co & Ors* [2013] 1 LNS 914 where it was held **that the test to be utilised was not that of "special circumstances" but**
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> D **rather the "rare and compelling circumstances" test** as enaunciated in *Reichhoid Norway ASA And Another v. Golman Sachs International* [2000] 2 All ER 679.
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> [29] In *Reichhoid* (*supra*), the standard was stated to be:
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> (a) invoked in "**rare and compelling circumstances**";
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> (b) there **ought to be very strong reasons for granting such a stay**;
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> (c) the **benefits likely to result from granting such a stay of proceedings must be clearly outweigh and disadvantage to the non-party**. (emphasis added)

F **[22]** However, the Court of Appeal in *Protasco Bhd v. Tey Por Yee & Another Appeal* [2018] 5 CLJ 299 referred to and analysed the test as applied by the Singapore Court of Appeal in the case of *Tomolugen Holdings Ltd A And Another v. Silica Investors Ltd And Others Appeals* [2015] SGCA 57 and held as follows:

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> [47] In allowing the appeals and granting a stay of the court proceedings against non-parties pending arbitration, the Singapore Court of Appeal *inter alia*, opined that the grant *of a stay of court proceedings to non-parties to the arbitration under the inherent jurisdiction of the court ought not, to be relegated to such a high threshold as the "rare and compelling circumstances" test articulated in Reichhold Norway*.
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> [48] *The decision of the Singapore Court of Appeal in Tomolugen is instructive* as it studies the approaches adopted in several Commonwealth jurisdictions prior to arriving at the proper approach to be adopted in Singapore. This therefore affords us a bird's-eye view of the approach adopted in several other jurisdictions enabling this court to consider the reasoning in these
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> I jurisdictions prior to determining the best approach to be taken in these appeals. (emphasis added)

[23] It is not entirely clear whether the Court of Appeal in *Protasco* (*supra*) applied the "rare and compelling circumstances" test. However, what is clear is that in the more recent case of *Apex Marble* (*supra*) the Court of Appeal had specifically held that the test to be applied for the granting of a stay against non-parties to an arbitration agreement is the "rare and compelling circumstances" test. I, therefore, accept this to be the correct test to be applied in the present case.

[24] I will now revert to the grounds relied upon by the respondent in support of the application and for opposing this appeal.

Premature Claim

[25] Learned counsel for the respondent's submissions (both written and oral) on this issue are lengthy and are tied to the issue of why the suit ought to be struck out.

[26] The crux of learned counsel for the respondent's argument is that the appellant's pleaded case is that the respondent's liability under the guarantee is a secondary obligation which means that the respondent's liability is contingent upon the liability of Lineclear being established by the appellant at the arbitral proceedings.

[27] Firstly, as I have stated earlier, learned counsel for the respondent cannot be allowed to submit on this issue as there was no appeal (or cross-appeal) by the respondent in respect of the Sessions Court's decision which disallowed prayer (a) of the application, that is to strike out the suit.

[28] Secondly, the net effect of learned counsel for the respondent's above argument is to invite this court to consider the merits of the appellant's claim when the suit was not struck out but stayed.

[29] To entertain learned counsel for the respondent's submissions is to delve into the merits of the appellant's claim. This, I cannot do as it will tantamount to the court prejudging the appellant's claim.

[30] It must be borne in mind that this appeal before me is in respect of the decision of the Sessions Court granting the stay only.

[31] If I were to accept learned counsel for the respondent's above submissions then I would have to make a finding or determination that the appellant's claim against the respondent is predicated on liability being first established against Lineclear, the subject matter of the arbitral proceedings.

[32] The respondent has not even filed his defence and as such has not stated his defence(s) against the appellant's claim.

[33] Without going into the merits of the appellant's claim, it is important to set out the position taken by the appellant on this issue, *ie*, whether the appellant's claim against the respondent is dependent upon liability being first establish against Lineclear in the arbitral proceedings. The appellant's position can be summarised as follows:

A (i) the appellant's has a standalone right to seek recourse against the respondent and is not based on liability being first established against Lineclear;

(ii) in this regard, the terms of the guarantee include an indemnity which entitles the appellant to take action against the respondent independent of its claim against Lineclear. It is for the court to determine if the respondent is liable to the appellant;

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(iii) the outcome of the arbitral proceedings is irrelevant because it will not bind the respondent.

C **[34]** In his submissions, learned counsel for the respondent went into great lengths to examine and analyse almost every minute detail of the appellant's claim to essentially show that the respondent's liability is secondary and subject to the appellant proving its claim against Lineclear.

D **[35]** This then elicited a response by learned counsel for the appellant to defend its position as stated above.

[36] Again, I reiterate and emphasise that if I were to entertain learned counsel for the respondent's arguments on this issue it would tantamount to determining the merits of the appellant's case against the respondent when the respondent has not even filed its defence.

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[37] I therefore agree with learned counsel for the appellant's submission that if the position, after trial of the matter, is that the respondent's liability is secondary and he cannot be liable to the appellant without Lineclear's liability being established, then this is a decision for the court to make after considering the documents and witnesses.

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[38] In other words, since the appellant's position is that it's claim against the respondent can proceed independently of the arbitral proceedings against Lineclear, then it is up to the appellant to prove its case.

G **[39]** Taking this issue further, in the event the respondent is successful in proving at the trial that the appellant's claim is secondary and subject to liability being established against Lineclear then:

(i) if the arbitral proceedings have not concluded and liability against the Lineclear has not (or has not yet) been established then the appellant's claim would fail as it has failed to prove its case against the respondent; or

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(ii) if the arbitral proceedings have concluded and liability is established against Lineclear at the arbitral proceedings then the appellant would have proven its case against the respondent.

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[40] In either scenario, there is no reason why the appellant's claim against the respondent cannot proceed simultaneously with the arbitral proceedings. It is also interesting to note that the respondent has not taken the position that it would concede to the appellant's claim against him should the appellant succeed in its claim against Lineclear in the arbitral proceedings.

[41] Unfortunately, though the learned Sessions Court Judge did not strike out the suit and her decision to grant the stay was not based on the argument that the appellant's claim is premature, however, she proceeded to make a determination on the merits of the appellant's case by finding that the appellant's case against the respondent is dependant upon liability being first established against Lineclear.

[42] With respect, the learned Sessions Court Judge had erred in making this finding as she has prejudged the appellant's claim.

[43] Her decision prevents the appellant from proceeding to trial to prove its claim against the respondent. This also raises the question as to whether the appellant can still proceed with its case against the respondent if liability is not established against Lineclear in the arbitral proceedings.

[44] Whether the guarantee includes an indemnity, separate and distinct and enforceable against the respondent with or without Lineclear is a triable issue.

[45] In the circumstances, it is unnecessary for me to analyse the cases cited by both learned counsel for the respondent and appellant on whether the guarantee includes and indemnity or whether it will not make a difference if the guarantee included an indemnity as the appellant's claim would still depend on liability being proven against Lineclear. These are issues for trial and ought not be determined at this stage.

[46] As such, I conclude that the appellant's claim against the respondent is not premature.

Multiplicity

[47] The issue of multiplicity of proceedings is connected to the above issue on whether the appellant's claim against the respondent is premature.

[48] Multiplicity of proceedings does not arise in this case and I agree with learned counsel for the appellant submissions on this issue in that:

(i) it is the appellant's position that it's claim against the respondent can proceed and be proven with or without Lineclear. The appellant should be allowed to prove its case against the respondent at the trial of this matter. I reiterate paras. 36 to 44 above that at this stage the court should not decide the merits of the appellant's claim against the respondent;

(ii) the appellant's case against the respondent (before the Sessions Court) is whether the respondent has breached the terms of the guarantee whereas in the arbitral proceedings the issue is whether there has been a breach of the film agreement by Lineclear and/or whether there is a total failure of consideration;

(iii) the appellant's claim against the respondent can proceed independently of the appellant's claim against Lineclear in the arbitral proceedings;

(iv) the arbitral decision involving Lineclear will not bind the court or the respondent who is not a party to the arbitral proceedings. Again, it bears repeating that there is no arbitration agreement/clause in the guarantee. Being a non-party to the arbitral proceedings, any award the arbitral tribunal makes will not bind the respondent (*LNH Landscaping Sdn Bhd v. TKH Construction Sdn Bhd & Other Appeals* [2021] 1 LNS 581; [2021] MLJU 761; *Vertex Superieur Sdn Bhd & Anor v. Shell Malaysia Trading Sdn Bhd* [2021] 1 LNS 1297; [2021] MLJU 1531; *Protasco* (*supra*)).

(v) the fact that the claimed sum against Lineclear and the respondent is the same does not render the action against the respondent not capable of being determined by the court. The Sessions Court has misconstrued a cause of action with a remedy. The appellant is entitled to seek the same remedy from different causes of action;

(vi) there is no evidence put forward before the court to show that the court proceedings and the arbitral proceedings would involve the same cause papers, documents, witnesses and facts.

Conflicting Decisions

[49] The learned Sessions Court Judge, in her grounds of judgment, held that the decision of the arbitral proceedings will impact the court proceedings against the respondent, however, her grounds are silent on whether there will or could be conflicting decisions between the arbitral proceedings and the Sessions Court.

[50] As stated earlier, the issues that the arbitral proceedings will deal with and the issues that that the Sessions Court is to determine are different. The arbitral proceedings can proceed concurrently with the court proceedings.

[51] The decision of the arbitral tribunal involving Lineclear will not bind the court or the respondent who is not a party to the arbitral proceedings and neither has the respondent, in applying for a stay, agreed to be bound by the decision of the arbitral proceedings in the case before the Sessions Court.

[52] I had also dealt with these issues earlier and reiterate paras. 39 and 48 above. In any event, there would not be any conflicting decisions.

[53] The respondent is not precluded from raising, at trial, that the liability of the respondent is secondary under the guarantee and is subject to liability being first established against Lineclear.

Delay And Indefinite Stay

[54] I have also taken into account that if a stay is granted it will be for an indefinite period of time.

[55] This is an important factor and was considered in *Tomolugen Holdings* (*supra*) and *Protasco* (*supra*). In both cases, the Singapore as well as our Court of Appeal had considered the delay issue and the period of the stay applied for seriously which were weighed in their decisions.

[56] On this issue, the winding up of Linear was brought to my attention through fresh evidence which was admitted *via* court order dated 20 June 2022. This coupled with Lineclear's appeal against the High Court's stay order will inevitably delay the arbitral proceedings.

[57] In this regard the following passage by Justice Mohd Zawawi Salleh (as he then was) speaking for the Court of Appeal in the case of *Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd* [2013] 3 CLJ 47; [2013] 4 MLJ 213 on some of the principles to be considered in applications for stay to be instructive:

> (e) it is important to stress that initiation of a suit in a court of law demands the suit will be heard expeditiously and completed without any inhibition midway. Therefore, where an application for stay of proceedings is intended to merely stop or suspend the proceedings, it will be refused. Some applicants, on seeing the weakness of their client's case, would resort to application for stay and thereby waste the time of the other party and the court.

[58] Adding this to the other considerations stated earlier would go against the granting of a stay.

Conclusion

[59] Whether it is based on the "rare and compelling circumstances" test or the traditional special circumstances test, weighing all the relevant factors, I did not find that either test has been satisfied to warrant the grant of a stay as prayed for by the respondent. With respect, the learned Sessions Court Judge had erred in granting the stay and this justifies me to intervene in that decision.

[60] I also note that the Sessions Court's order dated 8 November 2021 granting the stay ("order") allowed prayer (b) of the application which states, "digantungkan sementara menunggu rujukan pertikaian ke timbang tara" which is very unusual as this is not a stay under s. 10 of the Arbitration Act but made pursuant to the inherent jurisdiction of the court. The order appears

A have granted a stay pending reference of the dispute (between the appellant and the respondent) to arbitration. The dispute between the appellant and the respondent cannot be referred to arbitration as there is no arbitration agreement in the guarantee between the appellant and the respondent. Thus, such an order cannot be granted under the circumstances even if the
B respondent satisfies the "rare and compelling circumstances" test or the special circumstances test.

[61] For the reasons stated above, I allowed this appeal and set aside the Sessions Court's order dated 8 November 2021 with costs of RM15,000 in favour of the appellant.

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